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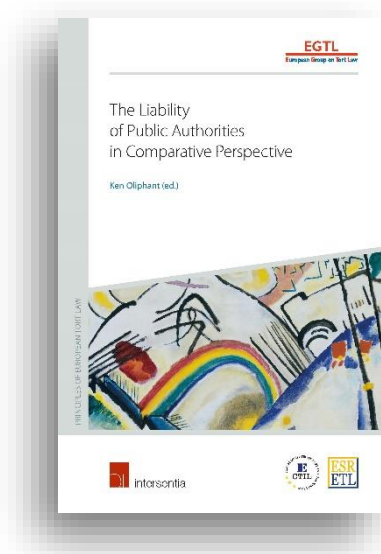
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INTRODUCTION

Ken OLIPHANT

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I. CONTEXT

01 In the last decades, liability relating to public authorities (‘public authority liability’) has been one of the main focuses of development in and at the edges of tort law in Europe, with major reforms implemented or considered at national level, and a steady stream of major court decisions. During the same period, ‘Member State liability’ has also been recognised in the law of the EU,¹ and the interplay of principles of national and EU law – and additionally the ‘just satisfaction’ jurisprudence of the European Court of Human Rights² – evidently warrants close attention. It was against this backdrop that the European Group on Tort Law Group embarked on its investigation of public authority liability from a comparative perspective.

¹ Starting with Case C-6/90, *Francovich v Italy* [1991] European Court Reports (ECR) I-5357. As to the nature of the liability, and its subsequent jurisprudential development, see European Union no 58 ff (Part I below).

² See generally *A Fenyves/E Karner/H Koziol/E Steiner* (eds), *Tort Law in the Jurisprudence of the European Court of Human Rights* (2011).

II. EXISTING STATE OF COMPARATIVE SCHOLARSHIP

02 Naturally, the importance of the topic means that several major comparative law studies have been undertaken in the area already.³ But the sheer pace of recent developments itself justifies the pursuit of further comparative research on the subject, and this was one of the considerations that led the European Group to embark on its own project on public authority liability. Irrespective of timing, it was also felt that what the Group would be able to produce would in any case have the potential to make a meaningful contribution to the existing literature. The Group's aspiration was to produce something more than merely a collection of conference papers and/or public lectures by embarking on a long-term and coordinated study that applied a common methodology to the description of public authority liability law in different jurisdictions, and sought to present information about each in a format that facilitates a point-by-point comparison between them. The resultant reports are contained in Part I of this book.

03 Further, it struck the Group as desirable to test and interrogate the information provided in these general accounts of public authority liability in different countries by inquiring into the application of the principles identified to concrete facts.⁴ The analysis of case studies from the perspective of the diverse jurisdictions represented in this book, to be found in Part II, allows a focus on

³ To mention only a few that compare a broad cross-section of national jurisdictions: *H Mosler* (ed), *Haftung des Staates für rechtswidriges Verhalten seiner Organe* (1967); *J Bell/AW Bradley* (eds), *Governmental Liability: A Comparative Survey* (1991); *B Markesinis/J-B Auby/D Coester-Waltjen/S Deakin*, *Tortious Liability of Statutory Bodies* (1999); *D Fairgrieve/M Andenas/J Bell* (eds), *Tort Liability of Public Authorities in Comparative Perspective* (2002); *H Belrhali-Bernard* (ed), *La Responsabilité Administrative: Comparaison Internationale*, special issue of the *Revue Française de Administration Publique*, no 147, 2013; *O Dörr*, *Staatshaftung in Europa. Nationales und Unionsrecht* (2014). Valuable shorter surveys include *R Rebhahn*, *Public Liability in Comparison – England, France, Germany*, in: *H Koziol/BC Steininger* (eds), *European Tort Law 2005* (2006) 68–93; *E Karner*, *Die Haftung des Staates für administratives, judikatives und legislatives Unrecht aus rechtsvergleichender Perspektive*, in: *Tagungsband XX Karlsbader Juristentag* (2012) 93–113. For analysis of (inter alia) Member State and Union liability under EU law, and comparison with national laws, see *W Wurmnest*, *Grundzüge eines europäischen Haftungsrechts. Eine rechtsvergleichende Untersuchung des Gemeinschaftsrechts* (2003); *H Koziol/R Schulze* (eds), *Tort Law of the European Community* (2008). Further references to comparative legal analyses of public authority liability are provided in the *Comparative Perspective* (Part III below).

⁴ This is the approach taken in *Markesinis/Auby/Coester-Waltjen/Deakin* (fn 1), though the geographical reach of that study is relatively narrow (just three legal systems) and the focus is on cases likely to be of interest to English lawyers in particular; the book's explicit 'target audience' is lawyers and (especially) judges in England. Notwithstanding these self-imposed limitations, the study constitutes a significant landmark in comparative legal research into public authority liability.

the outcomes likely to be reached in practice, and hence constitutes an important mechanism for identifying functional equivalences between the concepts applied in different legal systems, no matter how different they appear on the surface.⁵ At the same time, it enables the identification of differences in policy orientation – reflected in the shared world views and tacit understandings of different legal systems – even when the surface features of the law (its façade) look the same.⁶

III. AIMS AND SCOPE OF THE PRESENT RESEARCH

A. AIMS

04 The Group's aims in embarking on its public authority liability project were twofold: first, to contribute to the understanding of the law of public authority liability as it currently stands in the various European legal systems, and in selected legal systems elsewhere in the world, and thereby to facilitate its enhancement where necessary or desirable; secondly, to address the possibility for harmonisation in the area – specifically, through the extension and adaptation of its Principles of European Tort Law (PETL)⁷ to cover the liability of public authorities.

05 The Group's view at the time of the publication of the PETL in 2005 was that no recommendation should be made as regards State or public authority liability because this area is strongly influenced by historical and cultural heritage,⁸ and because its specific inclusion in the PETL might cause too much interference with administrative law.⁹ A comparable reluctance to set foot on this territory was also evident in the alternative vision of a harmonised European law of tort presented in Book VI of the Draft Common Frame of Reference (DCFR), entitled 'Non-contractual liability arising out of damage caused to another'.¹⁰ The DCFR expressly excludes its application to the

⁵ As to the functionalist approach to comparative legal research, see especially *K Zweigert/H Kötz*, Einführung in die Rechtsvergleichung: auf dem Gebiete des Privatrechts (3rd edn, 1996), §3 (available in English translation as *K Zweigert/H Kötz*, An Introduction to Comparative Law (trans T Weir, 1998) 32 ff).

⁶ Cf *R Sacco*, Legal Formants. A Dynamic Approach to Comparative Law (Installment II of II), 39 *American Journal of Comparative Law* 343, 384–86 (1991).

⁷ See *European Group on Tort Law*, Principles of European Tort Law. Text and Commentary (2005).

⁸ Art 6:102 PETL cmt 22.

⁹ Intro to Ch 6 PETL cmt 7.

¹⁰ *Study Group on a European Civil Code/Research Group on EC Private Law (Acquis Group)*, Principles, Definitions and Model Rules of European Private Law. Draft Common Frame of Reference (DCFR). Full Edition (ed by Christian von Bar, Eric Clive, Hans Schulte-Nölke et al, Munich: Sellier 2009).

liability of a person or body arising from the exercise or omission to exercise public law functions or from performing duties during court proceedings.¹¹ An important question for the European Group in its present project was therefore to test whether earlier doubts about the proposal of common principles of public authority liability remain valid.

B. INVESTIGATIVE SCOPE (MEANING OF ‘PUBLIC AUTHORITY LIABILITY’)

06 For the purposes of its researches, the Group took ‘public authority liability’ to refer to the non-contractual liability of a public authority to compensate for damage arising from its acts or omissions, or other acts or omissions for which it is responsible. Such liability includes liability incurred by or in respect of central and local government, judges and judicial officials, the legislature and ‘the State’ as such, as well as private entities performing public functions. In deciding what rules and principles should be addressed, the Group thus regarded it as immaterial whether or not the liability is classified as ‘public’ or ‘private’ in the legal system in question.

07 The Group considered that this subject matter is rich enough in content, and sufficiently distinct from the contractual and other liabilities of public authorities, to warrant its separate study. The Group in any case lacks the comprehensive expertise in these other branches of law that would have enabled it to embrace them within the scope of its project.

C. JURISDICTIONAL SCOPE

08 The legal systems encompassed by the Group’s research represent a broad cross-section of national legal systems in Europe (15 in all),¹² as well as (for comparison) selected legal systems from elsewhere, specifically Israel, South Africa and the USA. Israel and South Africa were chosen (as in previous Group studies) because they are mixed systems whose experiences and perspectives are – for that reason – especially pertinent to comparative legal research in Europe. The USA’s economic and strategic importance, and especially rich legal tradition, renders the reason for its inclusion self-evident.

¹¹ Art V-7:103 DCFR.

¹² In alphabetical order: Austria, Belgium, the Czech Republic, Denmark, England and Wales, France, Germany, Greece, Italy, the Netherlands, Norway, Poland, Portugal, Spain and Switzerland.

09 Naturally, the study also encompasses liability under EU law – both that of the Union itself and its institutions,¹³ *and* that of the Member States.¹⁴ Public authority liability under the European Convention on Human Rights (ECHR) is addressed too, albeit only insofar as it plays a role in the selected legal systems; there would be no point, however, in providing a separate account of liability under the ECHR as this would unnecessarily duplicate other research.¹⁵ Public authority liability under other transnational, supranational or international legal regimes was considered to fall outside the scope of the study and therefore excluded from consideration.

¹³ Art 340(2) Treaty on the Functioning of the European Union (TFEU).

¹⁴ *Francovich* (fn 1). As to the convergence of the two liabilities, see *P Aalto*, *Public Liability in EU Law: Brasserie, Bergaderm and Beyond* (2011).

¹⁵ Notably *Fenyves/Karner/Koziol/Steiner* (fn 2).

